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## Interim Hearing on Item Pricing

Senate Committee on Judiciary

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CALIFORNIA LEGISLATURE  
SENATE COMMITTEE ON JUDICIARY  
BARRY D. KEENE, CHAIRMAN

INTERIM HEARING  
ON  
**ITEM PRICING**

OCTOBER 1, 1984  
9:30 a.m. - 12:00 p.m.

STATE CAPITOL, ROOM 4203  
SACRAMENTO, CALIFORNIA

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## GOLDEN GATE UNIVERSITY

CALIFORNIA LEGISLATURE

SENATE COMMITTEE ON JUDICIARY

INTERIM HEARING

ON

ITEM PRICING

October 1, 1984

9:30 a.m. - 12:00 p.m.

State Capitol, Room 4203

Sacramento, California

CHAIRMAN: HONORABLE BARRY KEENE

Members

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John Doolittle  
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Sandra Williams, Secretary

85-1-460

HEARING TRANSCRIPT

WITNESSES

I. Senator Herschel Rosenthal -author of SB 1654

Ron Reiter and Susan Geisberg  
Deputy Attorneys General

Judith Bell  
Policy Analyst - Consumers Union

Bob Shireman  
Legislative Advocate, Cal PIRG - Sacramento

Kathy Klass and Bob Nyman  
Consumer Advisory Council

Frank Kuberski and Ralph Lubick  
Southwestern Regional Council, UFCW

Arlene Black  
American Association of University Women

Les Howe  
California Retailers Association

Kenneth Cope  
Sr. Vice President - Administrative  
Lucky's Grocery Store

II. Statement

Robert B. Lisker.....A-45

CHAIRMAN BARRY KEENE: Please be seated. We'll get started this morning somewhat later than anticipated. Members are scattered throughout the state and elsewhere and having a difficult time getting here.

This is an interim hearing on a subject that is familiar to most of us. The issue of item pricing is complex. The bill is controversial and so we agree with Senator Rosenthal, the Committee did, that we ought to hold an interim hearing and perhaps try to understand better all of the issues and resolve as many as possible.

The witnesses that will testify here today are all experts in the area of item pricing. All of the people have been working with the issue for several years. Many of the witnesses were instrumental in forming an earlier compromise, which is part of the history of the evolution of this legislation, and that was written into the 1981 Rosenthal-Roberti Item Pricing Act. However, many people contend also that the Act is unenforceable due to ambiguities in the statutes as they are presently written. So this bill was introduced as a clean up measure by presenting representatives from law enforcement, consumer groups, labor, and the retail associations. We're going to try to discuss the issue as thoroughly as we can and evaluate the arguments. I would hope that by the end of the hearing that we could come up with a workable solution to the problems encountered by consumers over the issue of item pricing.

Senator Rosenthal, why don't you open on the bill. We will also reserve some time for you to close on the measure after the arguments of opposition witnesses, as well as after having heard from your witnesses. Senator Rosenthal.

SENATOR HERSCHEL ROSENTHAL: Thank you, Mr. Chairman. As you indicated, the Rosenthal-Roberti Item Pricing Act is now three years of age. The purpose of today's hearing is to determine how well it has lived up to our expectations and to try to identify those statutory changes which need to be made. As everyone is aware, during the last decade the supermarkets have been using computers to aid in check-out of grocery items. Scanners which are capable of reading the bar codes on merchandise pass this information to a central computer which returns a price for the item to the cash register. Therefore, a checker no longer needs to see a price marked on the item. This system has many benefits for the store: price recording, inventory control, employee time accounting, shelf allocation, and reordering procedures can be computer-assisted with minimal additional expenditures of employee time.

There are benefits for the consumer too. The cash register tape can identify the exact product purchased along with the price. And those functions which reduce employee time can provide long-term consumer benefits by reducing costs.

But there are also dangers for the consumer. If the individual item is not priced, it is difficult to determine at the check-out counter if the computer has posted the correct price for the item. It becomes impossible to identify any price errors after

leaving the store. It also becomes much more difficult to compare prices over time. Few of us keep our cash register tapes for referral. Instead we see a sale price for peanut butter in a newspaper advertisement and we locate our jar of peanut butter for comparison, the one we have on the shelf. But if the jar has no marked price, we cannot determine the real value of the sale item and our price consciousness diminishes.

Because of popular concern that the advent of automatic check-out counters would place consumers at a disadvantage in the marketplace, the Legislature enacted the Item Pricing Act. But we are now hearing that the Act does not work as we anticipated. Consumers complain that few of the items they buy are individually priced. We hear that violators cannot be prosecuted because some of the provisions are ambiguous. We hear that governmental agencies cannot help to enforce the law even when clear violations are found.

I hope to learn today whether consumers are being placed at a disadvantage in spite of our legislation. Whether the provisions of the law are in fact ambiguous, and if so, how we can rectify these problems. Whether governmental agencies are unreasonably precluded from enforcing the law, and what steps markets have taken to comply with the letter and spirit of the Item Pricing Act. Finally, I'd like to hear if the changes proposed by Senate Bill 1654 would clear up problems contained in the current Act. Thank you very much.

CHAIRMAN KEENE: Thank you for your opening statement Senator Rosenthal. I know you'll be standing by to perhaps help us respond to questions that are raised. The first witnesses are Ron Reiter and Susan Geisberg, Deputy Attorneys General.

MR. RONALD REITER: Good morning, Mr. Chairman. My name is Ronald Reiter and to my right is Susan Geisberg. We are both with the Attorney General's office and have been invited by Senator Rosenthal to present testimony to this committee on item pricing.

The item pricing law, like many of the consumer protection laws that the Legislature has enacted over the years, was designed to provide important disclosure information to consumers to eliminate consumer confusion, and to facilitate value comparisons. Unfortunately, the item pricing bill has not served those goals very well at all.

There are two significant interrelated problems. One problem is the ambiguity in the law. What does the law really mean? What are the obligations under the law? The second problem, which is very closely related to that, is the ability or inability of law enforcement officials or private persons to enforce whatever guidelines are required in the law.

The central part of the law requires grocery stores to item price 85 percent of the so-called packaged consumer commodities which the store carries. The problem starts off at the very beginning because packaged consumer commodities is nowhere defined in the statute. Although consumer commodity is defined in a very broad way, packaged



consumer commodity is not. Because of this lack of definition, a packaged consumer commodity could mean all kinds of things. It could mean soup. It could mean tomato soup, it could mean canned soup, it could mean Campbell's Tomato Soup, it could mean Campbell's 10-ounce cans of tomato soup, or Campbell's 6-ounce cans of tomato soup, or other types of variations such as that. As a result, it's not exactly clear what you're supposed to be marking.

Another problem comes from the 85 percent requirement. Some of the original proponents of the bill thought that the 85 percent requirement was designed to give the stores a margin of error, that with all the thousands of items which grocery stores offer they would not be required by law to mark every single item, but in fact would be allowed a certain tolerance - a 15 percent margin of error - before any violation would be found. In fact, what has happened is that most of the stores have looked upon the 15 percent so-called margin of error as really a wild card exemption whereby they could select 15 percent of the categories of merchandise offered in the store and treat those as items not to be marked altogether. In so doing, there are a number of stores which have selected among this 15 percent of items the most frequently sold items so that items that consumers are more likely to buy are not marked at all.

CHAIRMAN KEENE: Excuse me. In the original bill, 15 percent referred to what? Fifteen percent of what?

MR. REITER: Well, there was a requirement that 85 percent of packaged commodities be labeled which means that 15 percent of packaged consumer commodities need not be labeled.

CHAIRMAN KEENE: Okay, but 85 percent of what? Eighty-five percent of the number of items? The number of units sold? Eighty-five percent of the types of items sold, 85 percent of the volume by weight? Eighty-five percent of what?

MR. REITER: It is difficult to precisely answer your question because packaged consumer commodity isn't defined. So, since we don't know what we're supposed to be labeling it's hard to know what this exemption is for. Probably a fair reading of the statute would be to allow the stores to do what they are doing now, which is to take categories of items, such as Kellogg's Corn Flakes, or Campbell's Tomato Soup, something of that nature, and say we're not going to exempt these at all, that is we're not going to label these at all because these are our definition of the 15 percent items which are exempt from the labeling requirement. And I think there is a lot in the statute which supports the reading of many of the stores right now, but it by no means clear.

So in other words, the stores could say we're going to decide that we're going to label a gourmet food product item, or ethnic food product item, but we're not going to label any Campbell's Tomato Soup or any Kellogg's Corn Flakes. We're going to treat those items which are frequent sellers as being within this exempt category of 15 percent.

CHAIRMAN KEENE: And the reason they shouldn't be able to do that is what?

MR. REITER: Well, the reason is that those items which of course are frequently purchased are items which consumers should know the price of, and that the 15 percent figure should be used, and many of the proponents originally thought would be used as a cushion, if you will, so that if there were inadvertent mismarkings or nonmarkings of products, there would be no violation.

CHAIRMAN KEENE: I'm having a little bit of trouble understanding the criticism that they are selecting out of frequently purchased items. The law reads, "...have a clearly readable price indicated on 85 percent of the total number of packaged consumer commodities offered." Now if it happens to be an item that is frequently turned over, that would count as part of the total number, wouldn't it?

MR. REITER: Well, it depends, Senator. As I say, here is part of the ambiguity. One way of reading it is as you have read it. Another way of reading it is, if we take a look at all the categories of items sold in the store - soup, Corn Flakes, whatever - we are going to decide that 15 percent of these categories of items we are not going to mark at all. And the 85 percent that's left over of the categories, we're going to mark all of them.

CHAIRMAN KEENE: But where does it talk about categories? It says 85 percent of the total number of packaged consumer commodities.

MR. REITER: The problem there, Senator, is that since packaged consumer commodity is not defined many people determine packaged consumer commodity to mean categories rather than individual units of a particular good. So that, for example, if you had 50 cans of tomato soup on the shelf, those would not be considered 50 packaged consumer commodities, but one consumer commodity, depending upon how the statute is read.

As a result of the ambiguity in both the 85 percent requirement and definition of packaged consumer commodity, many stores in fact are not approaching the goal of near complete item pricing for covered items, but we've found between 50 to 70 percent of a store's total nonexempt merchandise is marked.

In addition to the ambiguity, there is a problem in enforcement generally. Even if we could all agree or determine what is the meaning of the statute, there becomes a problem of who can enforce that meaning. With regard to the public agencies, and we of course are most concerned with that, as a practical matter there is no possible public enforcement for a variety of reasons. Number one, there are no criminal sanctions which are authorized. Number two, there is no administrative overview of what is going on. For example, in past laws on item pricing the Legislature placed the item pricing law in the Weights and Measures Section of the Business and Professions Code so that the weights and measures people could at least monitor what was going on. Now it's in the Civil Code and there is no direct administrative enforcement by anyone.



The current law provides that there is a civil penalty for intentional violations but the statute doesn't specifically say who's entitled to collect that civil penalty, whether it's an action brought by the Attorney General or by a district attorney, or even an action brought by a private person. It's not clear since no standing is especially conferred on anyone in the statute.

CHAIRMAN KEENE: Why doesn't that leave it open to any one of those entities filing an action and collecting the penalty?

MR. REITER: It's not exactly clear. Since it's not clear who can bring an action there are some agencies who are reluctant to get embroiled in a mountain of civil litigation without even knowing that they have standing to bring the action to begin with.

CHAIRMAN KEENE: Well, it's unlikely that the courts would say that we passed a law that provides for civil penalties with no one having standing to bring that action.

MR. REITER: That's correct sir, but it's very possible, for example, that a local city attorney might bring a civil action and find that he can't. Then in another county somewhere else, the county counsel might decide to bring an action and find out that he can't. Then in a third county a private person might bring an action to recover the civil penalty and find out that he can't. And until there would be some appellate resolution of the problem, people don't exactly know where the standing is.

In addition to the problem of no express standing, the amount of the penalty is very small and is designed only for intentional violation. Since violation is not exactly clear, for example, if a store decides not to item price any item in the store, that might be only one violation subjecting the store to the maximum civil penalty of \$500. It isn't clear from the way the statute is worded what would constitute a violation. In addition, because only intentional violations are subject to the civil penalty, it would be incumbent upon whomever is bringing the action to prove intent. Now although the statute provides some presumptions of intent, they are only presumptions, and in order to properly prepare a case it would be necessary to take discovery to find out what exactly the store policy was and whether there was any intent in not marking the items. If you stop to think of the Herculean task of litigation these days, five-year delays in going to court in some of our counties, all for the collection of a maximum sum of a \$500 penalty, it certainly discourages enforcement by law enforcement agencies who might feel they would get better results prosecuting other laws and letting this law go totally unenforced.

CHAIRMAN KEENE: Has any law enforcement agency attempted to bring an action under this section?

MS. SUSAN GEISBERG: Yes, I believe one of the later witnesses will talk about that. I believe the San Francisco District Attorney's office had looked into bringing an

action and I believe he will discuss that. That's the only one at the moment that we know of. I have talked to a couple of other D.A.'s who, due to the problems with the bill, just refuse to look into it.

MR. REITER: I think, Senator, that I might even mention at this juncture that an attorney representing one of the industry associations told a member of the Attorney General's office that the bill was designed, or at least the industry people had tried to work for a compromise in the bill, in such a way that enforcement by public agencies would be impossible, and I believe that there is some indication from the opposition to SB 1654 that one of the objections of industry is that the law, if it were changed by Senator Rosenthal's new bill, would become enforceable.

CHAIRMAN KEENE: I just wonder if there isn't a sanction in the public relations, the poor public relations that are received by a major supermarket chain when an action is filed against them for intentionally violating a section of the law requiring that items be priced?

MR. REITER: Well, there may be Senator, but of course we can't try our cases in the press and we want to only bring those actions which we feel we can successfully bring and those actions that will have a decent remedy.

CHAIRMAN KEENE: Well, I'm not suggesting that any action that was ill-founded ought to be brought, but what I am suggesting is that an action that is well-founded is unavoidably brought to the attention of the public through the media. That may be far more of a sanction than the dollar penalties involved even if they were considerably larger. I just wonder what the experience has been. You say that there'll be people testifying later as to what the experience is, but I'd like to find out what it is.

MR. REITER: I know that the Attorney General's office has been generally disinclined to bring any actions because of the uncertainties in the law and the questionable penalties. One other thing I might mention along the lines of public enforcement, and that is that the statutory remedies, which I think are quite meager, are the exclusive remedies which are available in the entire field of item pricing. And there are even some ambiguities in that, if for example I may take a hypothetical of ten of the largest supermarket chains getting together in a smoke filled room and conspiring not to item price. There is an argument that can be made that they'd be immune from any antitrust prosecution because item pricing is completely occupied in this Section 7100 of the Civil Code.

Private enforcement is also very difficult. Only an injured person can bring an action. We don't really know what an injured person is. Is it someone who is aghast at the fact that the law is being violated? Is it a person who buys an item and finds out later that it's not item priced? If a person picks up an item which is not item priced and takes it to a checkstand, is that person injured or is that person knowingly

subjecting himself to injury? Hard to say. In addition, the only types of remedies that a private injured person can recover would be losses and expenses - and query what those would be - and a \$50 penalty. Class actions and multiple actions are specifically excluded so a private person would have to be there on his or her own.

Now a private person, like a public agency, would have to establish an intentional violation and consequently might be required to conduct discovery or other investigative means to determine whether the violation was intentional. Is a person likely to do that to recover a maximum \$50 penalty when that person's attorneys fees and costs are not going to be covered? One of the changes made in Senator Rosenthal's SB 1654 is to provide for attorneys fees and costs in the event an action is brought and the consumer is the prevailing party. The chance then of any private action is really nil.

SB 1654 eliminates many of the definitional ambiguities which are present in current law. It requires clearly that all items that are covered by the Act be item priced, but provide a 15 percent margin for any error so that stores would have a comfortable cushion, and would enable public agencies and private persons to enforce the law in a way which we believe the Legislature originally intended.

One thing I would like to stress, Senator Keene, and then I'll conclude my remarks, and that is the problem presented by the current legislation is one not just of enforcement or just of ambiguity, but one that is related. So that if the ambiguity problem were cured and not the enforcement problem, the statute would still be impotent. Likewise, if the enforcement problem were cured and the ambiguities were not cured, we would be able to enforce a statute that nobody could really understand. So, both problems have to be addressed in some way in order for this legislation to be effective.

CHAIRMAN KEENE: Okay. Ms. Geisberg, would you like to add anything?

MS. GEISBERG: I really came up to answer any questions. I think his testimony has covered our concerns.

CHAIRMAN KEENE: Okay. Thank you.

MR. REITER: Thank you, Senator.

CHAIRMAN KEENE: Bob Perez, Deputy Attorney General, San Francisco, who said he may be late and is true to his word. Judith Bell, Policy Analyst, Consumers Union.

MS. JUDITH BELL: I'm here today not only speaking for Consumers Union, which is the non-profit publisher of Consumer Reports, but also for Consumer Action, which is a non-profit advocacy organization in San Francisco, and also for the Consumer Federation of California. I'm a board member of both of those last two organizations. All three organizations have been involved with item pricing for more than eight years.

I want to start by talking a little bit about the work I did on item pricing. In 1982, Consumer Action conducted a survey of all the major chains in the greater Bay Area on the item pricing statute. These included Albertson's, Alpha Beta, Bell Markets,

Pak 'N Save, Calif Foods, Co-op Stores, Lucky Markets, Park 'N Shop, and Safeway. We found problems with all the major chains except for Lucky Stores, which chose to only exempt those items already on the exemption list in the bill. The problems with the other stores included virtually no item pricing, no exemption list posted or available, and varying definitions of what a consumer commodity is. So that at some stores we found green beans defined as a consumer commodity and in other stores a specific brand 15-ounce green beans defined as a consumer commodity. This meant that it was impossible for us to tell whether or not 15 percent of the items were exempted.

We filed complaints with all of the district attorneys for all the counties concerned and it was only the San Francisco District Attorney that decided to at least pick up our complaint and investigate it. The investigator for the district attorney's office found it virtually impossible to determine whether or not stores were in fact pricing 85 percent of the items because of both the problems I mentioned of the different definitions of consumer commodity and the unavailability of lists to tell what in fact was out in the store.

Instead the district attorney tried informal meetings with grocery store representatives, but as their research continued, it became clear that they didn't really have any ability to enforce and we ended up with what was a loose and unenforceable agreement that the stores would simply have a list available for consumers if they wanted to see what the store had chosen not to price. The list, however, had no requirement to even have the price on the list to tell the consumer what the price was actually supposed to be.

What we've been left with is a problem that continues and with no ability to enforce it and no ability, it seems, to keep any control over what is and what is not priced. We did a survey just last summer, an exit survey at San Francisco supermarkets, and found that approximately 85 percent of consumers think it's important to have item pricing. We've followed that up with a more scientific poll conducted by the California Public Interest Poll, which is a joint project of the USC Institute of Politics and Government and Common Cause. This poll was conducted on June 6 or 11, 1984, and included questions on public policy and also how important item pricing was in the decision to shop. Eighty-five percent of the consumers surveyed said that item pricing was a somewhat very important factor in their decision of what market to shop at.

To conclude I want to mention that we believe that SB 1654 contains the important elements to remove the definitional ambiguities in the current statutes and to allow enforcement by giving specific definitions in allowing district attorneys to enforce the law.

CHAIRMAN KEENE: Okay. Thank you very much for your testimony, Ms. Bell. Bob Shireman?

MR. BOB SHIREMAN: Good morning, Senator Keene.

CHAIRMAN KEENE: You're a legislative advocate with Cal PIRG, a public interest research group here in Sacramento?

MR. SHIREMAN: Right. I mainly wanted to give you some more survey information from this year, not 1982, but May of 1984. Thirty-three Cal PIRG volunteers from around the state looked at item pricing in 44 stores in 15 different chains in California. What we did was take the average shopping market basket, which is generally used by the U.S. Department of Food and Agriculture in determining increases and decreases in prices, and looked at how many of those items which the average shopper would buy were item priced. In stores without the scanners, I guess the old fashioned stores in a sense, we found everywhere from a low of 86 percent item pricing to a high of 98 percent. The low was at a co-op store and the high was at Albertson's. In stores with scanners, which is what the item pricing law applies to, we found that most of the stores were under 30 percent item pricing. The lowest was Ralph's with 3 percent and the highest was Westward Ho in Los Angeles with 69 percent. I should also note that Lucky's was pretty close with a 62 percent.

We were involved with the support of reform of item pricing three years ago and with these findings from the survey of May of this year, we support SB 1654. The expectation from the item pricing law of 1981 was that 85 percent of those nonexempt products that the average shopper takes out of the store would have item pricing. I would think, and I wasn't here at that time and did not take part in the actual compromise, but I would think that the legislators involved would have expected in thinking about, okay, let's allow a further 15 percent exemption, that taking those items, those products which are specifically exempt in the bill and then allowing an additional 15 percent exemption, that those are the products you would end up having item priced.

If you were to take, for instance, in our survey the lowest non-scanner store percentage, that was 86 percent at a co-op store, you would expect that with an additional 15 percent exemption would bring that down to about 72 percent. Based on that, item pricing at scanner stores with the law as it reads should be about 72 percent, but none of the stores reached that level. We found that the problem is that the lack of definitions in the law make it virtually impossible to enforce.

Thank you.

CHAIRMAN KEENE: Thank you very much, Mr. Shireman. Can you hold for a question? Mr. Wong.

MR. GENE WONG: A couple of questions in terms of methodology. When you surveyed these stores, what did you use as your definition as consumer commodity? Did you treat 58 cans of Campbell Soup as one consumer commodity or did you treat that as 58 separate

items?

MR. SHIREMAN: What we did was take an average consumer shopping list and we used the same list around the state, so it would be a specific product like Campbell's 10-ounce can of soup, and those same products were looked at in each of the 44 stores that we looked at around the state. So we didn't look at a product line or anything and whether that product line was item priced. We looked at one particular type of product, like Campbell's 10-ounce chicken soup, and if at least half of the items that we saw on the shelf for that product were item priced, we said okay, that was item priced.

MR. WONG: Even though the law says that if twelve units that aren't item priced would be presumption that there was intent to violate?

MR. SHIREMAN: Right.

MR. WONG: So you were giving grocers and retailers perhaps the benefit of the doubt?

MR. SHIREMAN: Definitely. Yes.

MR. WONG: Okay, another question is this. You say Cal PIRG has various volunteers doing this project for you. Have any of your volunteers gone to small claims court to enforce this item pricing law, as I think they can do?

MR. SHIREMAN: No, we have not.

MR. WONG: Is there any particular reason why not?

MR. SHIREMAN: We felt that we would need legal backup in terms of the ambiguities in the law and the cost of bringing that type of proceeding, we haven't decided to do that. From the advice of the Attorney General's office and various D.A.'s offices, we felt it would be an enormous undertaking for a volunteer organization that doesn't have that kind of funding.

MR. WONG: Thank you.

CHAIRMAN KEENE: It sounds - you mentioned advice of the Attorney General's office and the district attorney's office that it was not worth bringing a suit or that it would cost too much, it would be cost ineffective.

MR. SHIREMAN: Well, the ambiguities in the law, and I'm not an attorney, that the ambiguities in the law make it difficult to enforce and that therefore we did not go forward with any lawsuits of any type.

CHAIRMAN KEENE: And why not in small claims court? That certainly doesn't cost very much. It's not very difficult to bring an action.

MR. SHIREMAN: I don't know, Senator. I was not ... the decisions were made in Los Angeles and I wasn't involved and I frankly don't know.

CHAIRMAN KEENE: Well, it sounds as if there is a little bit of a boycott of the existing law. We don't like the statute therefore we're not going to enforce it, and then we're going to come in and testify that it's unenforceable. That doesn't sound very good to me.

MR. SHIREMAN: If we don't feel that we're able to make a ... we feel we're able to make a case that the law is not working, but it's difficult to say because of the lack of definitions whether or not a particular store is complying with the law. A store may say, for instance, that the average shopping basket does not represent the items in the store and that they were exempting these particular product lines and based on that they were in compliance in the law. And that is something that would be difficult to argue because of the ambiguities in the law. What we're asking for from the Legislature is a reform that would allow a consumer, that would allow a Cal PIRG volunteer ...

CHAIRMAN KEENE: I understand exactly what you're asking for, but you're using as evidence of the fact that the law is unenforceable, that there have not been a number of successful suits, and yet no actions have been attempted even in the place of the easiest access for the consumer - small claims court. Consumers, homeowners are out shutting down airports through the small claims court process and they can't bring actions here under the existing law to try to change the behavior of supermarket management. I don't see why that's the case. I think the evidence would certainly be better if it had been tried and rejected than to simply say, well, we can't do it, there are too many impediments in the law. And then to come in and to bootstrap and then to say, well, the law's not working although we have not tried to make it work.

MR. SHIREMAN: Perhaps I should rephrase what we found as evidence that grocery stores are at least in some way getting around the law, whether that is because the law is unenforceable or whether because consumers are unwilling to go to small claims court to enforce the law. I think the intent of the Legislature is to have the grocery stores comply in good faith with the law and to enforce it, not force consumers to have to force grocery stores to comply with the law by going to small claims court. If that is what needs to be done, then perhaps that is what we need to do.

CHAIRMAN KEENE: Well, I guess we could certainly clarify the standards to some extent. We could increase the penalties, but then if no actions were brought, there would be no necessity for compliance under those circumstances, and I suppose the same argument would apply that, well, we didn't intend for people to have to go to court to enforce them. I mean, we could certainly clear up the law and we could certainly increase the sanctions, but if it's not going to make a difference, why should we do it? If people aren't going to bring action.

MR. SHIREMAN: There is also the district attorney's office and the Attorney General which have been interested in bringing actions, but as you heard from Ron Reiter, have chosen not to because of ambiguities in the law. I think that that's in general where enforcement should lie and people shouldn't have to enforce the law through small claims court action.

CHAIRMAN KEENE: Well, the logic alludes me, I must admit. I just feel that some



action should have been brought and it should have been tried, and certainly small claims court is an appropriate place to do it. I'm just amazed that no actions have been brought unless the advice was - we'll never get this law changed if we can make it work; what we need is a stronger law, something that is more enforceable - when it has not yet been attempted to implement the law as it is now. I understand your arguments, but the logic behind them just escapes me entirely.

MR. SHIREMAN: If we don't feel we can make a strong enough case because of the ambiguities in the law, it's not something we're going to go after again.

CHAIRMAN KEENE: Even in small claims court? You might have succeeded. If you had succeeded you wouldn't be here saying we can't enforce the law. So it sounds to me like everybody sort of agreed that we're not really going to try to enforce this law because if we do that we won't be able to come in and argue to get it changed.

MR. SHIREMAN: Well, there was no such agreement.

CHAIRMAN KEENE: You said you heard from the Attorney General's office and from district attorneys.

MR. SHIREMAN: We're not talking about one store or any particular place, we're talking about virtually every store that the law applies to. But perhaps we should be looking more into enforcement through the small claims court. However, I think that that's not the way to enforce a law statewide. I think actions by the district attorney's office and the Attorney General ought to be encouraged through some changes in the law.

CHAIRMAN KEENE: I understand your position. Maybe we ought to close down the small claims courts under that argument. Thank you very much. Kathy Klass, Consumer Advisory Council.

MS. KATHY KLASS: Good morning.

CHAIRMAN KEENE: And Bob Nyman.

MS. KLASS: Bob Nyman, who is a consumer.

CHAIRMAN KEENE: A consumer.

MS. KLASS: Thank you, Senator Keene. I am Kathy Klass, the Executive Officer of the Consumer Advisory Council. The Consumer Advisory Council is the council which represents a cross section of the marketplace. We have one labor, one agriculture, one business member, two consumer members, two public members, Senator Rosenthal and Assemblyman Katz, who's on the Council, and it's our job to bridge the gap between the public and the Legislature and that was sort of why we were established.

In March of this year we held a public comment period on item pricing. I have provided you with the minutes to that meeting and a letter from somebody who couldn't attend the meeting. I would like to also discuss some of the issues that have been brought to my attention on this issue and to tell you that I do have a video tape of a couple of news clips that show some of the problems in the supermarkets. There are three

supermarkets represented here and a half a dozen consumers, and I would be happy to leave it with you. It's my only copy so I would hope to have it back.

CHAIRMAN KEENE: We will see that you get it back.

MS. KLASS: Most consumers, I want you to know, accept computer scanners. Many of them don't like it but they accept it as part of the technological age, but they feel it's a basic right to have each item individually marked before they purchase it. I'd like to talk to you about some of the problems that have been brought to my attention.

CHAIRMAN KEENE: I hope that at some point in your testimony you will tell me why suits have not been brought under the existing law by consumers or by district attorneys or the Attorney General's office.

MS. KLASS: Would you like me to address that now or at the end of my comments?

CHAIRMAN KEENE: Whichever you prefer.

MS. KLASS: I prefer to do it at the end of my comments, okay?

CHAIRMAN KEENE: That's fine.

MS. KLASS: They find that without item pricing that they are left without knowing what products will cost because often the shelf price isn't consistent with the item's price above on the shelf. Consumers are angry because they feel the supermarket industry promised that prices would be lowered in exchange for item pricing and they say to me that hasn't happened. They find it's difficult to budget without individual prices and parents with small children find it very difficult because they cannot take their attention away from the children long enough to read shelf prices. Handicapped shoppers have a difficult time with shelf prices on upper and lower shelves.

Supermarkets today have a lot of distractions at the check-out stands, so without item pricing the consumer cannot compare his receipt with the purchases. One of the women at our hearing in March said that her store now has news grease at the check-out stand. Item pricing makes it easier to compare prices from store to store and since prices change rapidly, item pricing would give consumers an idea of the inflationary factor to figure into their food budget.

There are a variety of sizes of products for one brand, one issue, often have only one shelf price even though there may be different sizes on a particular brand. Item pricing gives an idea of the age at the product at home on the shelf. When you look at something and the price is quite a bit less. And older and poorer people are often embarrassed at the check-out stand because they don't have enough money when item pricing is not used. For these low income people a few cents makes a difference on the other bills they must pay.

One of the things that I've heard from the supermarket industry repeatedly is that consumers don't complain. To a certain extent that isn't true. They complain to the cashier who isn't going to necessarily go to her boss. Or they complain to the store

manager who isn't necessarily going to forward that dribble complaint onto corporate headquarters. One of the major chains tried a postcard that was supposed to go directly to the president of the chain and I thought it was a great idea except that consumers didn't know about it. It isn't always at the check-out stands and the cashier's don't know about it, so that if you take the time to ask for the postcard, that you want to forward a complaint to the president of the company, it inconveniences everybody else in line. I don't know if you've been to a supermarket in rush hour lately, but people just want to get out. So, most consumers are intimidated to take any more time than they have to.

I'd like to address the small claims court issue. I think that one of the things that I have found in my work with small claims court is that you have to have a monetary loss before they will listen to the issue. In the bigger cities throughout the state currently there are a lot of judges pro tempore that sit on the bench and they are not familiar with a lot of the consumer laws. I have worked with the State Bar Committee on a consumer bench book, but small claims court, I don't know if it is an appropriate channel for an item pricing suit. Deputy Attorney General Ron Reiter would like to address this issue later on.

CHAIRMAN KEENE: Well, let him come up and address it now. I think the arguments are very weak. The first argument that was made by the Attorney General's office is that we don't know who has standing, therefore nobody brings a suit because we might not have standing. That is quite weak. The second with response to small claims court is well, small claims court - what is the argument? Why not use the small claims court?

MR. REITER: I think there are several reasons why small claims court is not an effective medium for addressing this problem.

CHAIRMAN KEENE: Has it been tried?

MR. REITER: I don't know whether anyone has tried it around the state. I don't know.

CHAIRMAN KEENE: It's crazy to say a law is not enforceable when in fact no one has tried to enforce it. You haven't tried to enforce it and you have apparently discouraged consumers from enforcing it by putting the word out that this statute is too weak and ineffective and we've got to get a change in the Legislature.

MR. REITER: Our office's position is that it is that way. We haven't advised anyone not to bring an action. However, in recent...

CHAIRMAN KEENE: Well, someone testified that you had. That law enforcement generally had said the statute's ineffective, don't bother with it.

MR. REITER: I do know that that is the position generally of not only the Attorney General's office, but of various district attorneys around the state. About the small claims court, Senator, there are several problems someone would face trying to go into

small claims court. The first thing is that in order to bring the action to begin with they have to be injured and they have to establish some loss that they can get compensation for in small claims court.

CHAIRMAN KEENE: I would imagine that would be fairly easy to do.

MR. REITER: Senator, I don't think so. For example, suppose you find an item on the shelf and the item is not item priced. Are you injured at that point? Are you injured at the point that you go to the checkstand and buy it?

CHAIRMAN KEENE: Certainly.

MR. REITER: But Senator, if you knew the item wasn't item priced and you bought it, didn't you invite the injury upon yourself? Can you really say that you are an injured person?

CHAIRMAN KEENE: I think you have to reason in a very convoluted way to come to that conclusion that a person has not been injured under those circumstances and consented to the injury by paying for the product. I mean that's reasoning that would not keep a person out of small claims court.

MR. REITER: Well, I hope you're correct, Senator. In addition to that it would be necessary to prove an intentional violation. It's going to be very difficult for the average consumer to prove that the supermarket ...

CHAIRMAN KEENE: It certainly becomes more difficult when no one tries.

MR. REITER: ...engaged in an intentional violation. The presumption that is provided under the current law has various problems in it. For example, if there are less than twelve items on the shelf to begin with, it's going to be difficult to use that presumption altogether. In addition, it's going to be difficult to document that the particular item was not item priced, that other items on the shelf were not item priced. It's going to be difficult, if not impossible, to rebut any defense that is raised.

CHAIRMAN KEENE: It's neither difficult nor impossible in my judgment. It creates a slight burden but it's neither difficult nor impossible.

MR. REITER: Well, absent the ability to conduct discovery, Senator, someone is going into - a lay person is going into a small claims court and trying to rebut a defense without any information. That's, I think, a rather formidable task. In addition, if someone is interested in addressing the problem, let's say a systematic problem of lack of item pricing, an injunction might be an appropriate route, but of course small claims court has no jurisdiction to grant an injunction. So, I think that while there may have been people who will go to small claims court, individuals who might be disgruntled will do that, they do face rather formidable obstacles. In addition, a lot of people ...

CHAIRMAN KEENE: I don't agree with you that they are formidable and I don't

think that you've made out a case that they are formidable. I think that you've only made out a case that some case has to be made out in small claims court and usually in most small claims court the burden of proof is not pursued to the n-th degree with all the legalisms involved. The judge gets a pretty good idea of what is happening in a supermarket at a particular time to a consumer and can make a judgment on that basis. But the fact that it's never been tried, the fact that it's not been tried in your knowledge or judgment and that you haven't encouraged people to go that route suggests to me that there's really not a great deal of interest in seeing that the law's enforced as it is currently constituted. So we can't use as empirical evidence of the fact that it's not working, that law suits have not been successful, because they haven't been tried.

MR. REITER: Senator, it's difficult to place the entire enforcement of a difficult and complex and convoluted statute as this on a few disgruntled people who are going to take the time and effort to go to small claims court, face the hurdles they'll have to face in order to get, perhaps, a \$50 settlement.

CHAIRMAN KEENE: You're talking about tens of thousands of consumer transactions each day. If the number of consumers were fed up with the situation in a particular store, if the consumer individuals who have this information at their fingertips know that a store is well below par in its compliance with the law, it would seem to me that several suits in small claims court would do exactly what happened with airports.

MR. REITER: Senator, I don't think people will be galvanized into the type of action that occurred when homeowners were facing substantial loss and damage as a result of airport noise. I don't think this situation is at all comparable. We've had one source, we've had a number of people banding together to deal with that particular problem. Unfortunately, or fortunately, depending upon your perspective, the consumer communication is not that great that consumers shopping at one particular store which is violating the item pricing law will bring successive actions to stop it. And a \$50 statutory penalty is certainly a license fee, if you will, a cost of doing business, and if the store is intent on violating the item pricing law, one or two small claims court actions with a maximum exposure of \$50 is not going to stop them.

CHAIRMAN KEENE: Okay, thank you for your response. I knew nothing about this when I arrived here this morning. I had fully expected that you were going to come with evidence that the law is not working and you've gone to court, that the courts have said it's too ambiguous to bring an action, that the sanctions that are involved are far too light given the cost of litigation; but nothing's been tried, neither public agencies nor individuals have apparently brought actions that have failed under this law. It might well be enforceable, it might well be influential in affecting the behavior of supermarkets and their managers, but we don't know that because you've discouraged

litigation by public agencies and private individuals.

MR. REITER: Well, to my knowledge Senator, the Attorney General's office has never discouraged private litigation in this area.

CHAIRMAN KEENE: I think you're putting the word out now by testifying at this hearing that the law is unenforceable. Certainly people are not going to go to court and try to enforce it. And the evidence for that is nonexistent, that the law is unenforceable.

MR. REITER: Well, Senator, I think I would just be repeating my prior testimony talking about the ambiguities in the law which make the law a sieve through which most of the retailers who wish to violate the law are easily able to pass.

CHAIRMAN KEENE: But in laying the burden on us to come up with a stricter law, you're certainly not helping us along by saying that the law obviously has not worked in the past when in fact you have decided not to make it work in the past. Now, you say well, we don't tell people not to make the law work, but you certainly have gotten out the word that this law is unenforceable and therefore people have not tried to enforce it. That's everybody's impression who's testified so far.

MR. REITER: Senator, every law enforcement agency has to make a decision as to where it's going to commit its resources and make its law enforcement commitments and I think it's to be expected that an agency is going to pick an area where the law is fairly clear and the law is able to be enforced and people are not guessing as to what it means, and also an area where the penalties are going to have some significant impact on the industry as well as a particular defendant. Senator Rosenthal is trying to achieve that with SB 1654. The reason that law enforcement agencies around the state have declined to vigorously pursue this law is because there is not very much there to pursue. It's not a question of abdication of duty nor is it a problem of a lack of interest. We would certainly be interested in fairly enforcing, reasonably enforcing an item pricing law and we encourage the Legislature to give us the tools with which to do it. In our estimation it hasn't been done.

CHAIRMAN KEENE: It seems somewhat odd to me that there has been a failure of enforcement virtually uniformly in the State of California based on somebody's decision that the law will have no effect in doing what its supposed to do and that is getting item pricing up to the levels of the law. No one has brought an action. At least no one has testified that anyone's brought an action and failed as yet. I would just like to see some evidence on that. Senator Lockyer.

SENATOR BILL LOCKYER: Perhaps I missed earlier in the morning some discussion of claims of violation of the Act. Has that, has somebody made a presentation about that to indicate there is a need for better enforcement?

CHAIRMAN KEENE: The public information research group had done some testing and

found that there was a substantial lack of compliance with the standards of the law as they interpret it. There was some evidence of that. But there has been little evidence of any effort to enforce the law. In fact there has been none as far as I know of, so far. We may hear from other witnesses who have some evidence that the law has attempted to be enforced without success.

SENATOR LOCKYER: Thank you.

CHAIRMAN KEENE: Mr. Nyman.

MR. BOB NYMAN: Good morning. Up until my recent retirement I've been a local government manager for some 30 years. I've been county administrator in several counties in two states. For a long period of time I was deputy county executive in Santa Clara County. More important than that, however, is that during that same 30 years I have also been a principal purchaser of grocery items for my household. That hasn't just been a matter of an unavoidable duty, it's been a matter of me wanting to learn a lot about the retail industry as a matter of interest. And also as an analyst. There is no question in my mind at all that the real issue here is the consumer's ability to validate this whole process. There has to be some way to validate it. One very important reason for a system of validation is the fact that an awful lot of the income of the typical family today is expended in this general area, and it's simply too large to allow to go to the whim of the marketplace.

There are a number of different factors that enter into the validation process. Obviously, the postpurchase comparison with the cash register tape to the goods purchased is important. Comparison of price from store to store. The ability to historically track changes in price has been mentioned. Also such things as making an evaluation of the feasibility of coupon savings is a factor that requires item pricing to be an effective tool. But I'd like to talk about something that is even more important and that is the human understanding perspective.

If you think back to the last time you went through a non-automated check-out service store - a non-automated - with a full bag or let's say a full cart of groceries, I think you must have been amazed today with the electronic cash register frequently coupled to a weighing device and the speed of the clerk in processing those items. And I would argue that it's almost impossible today even with item pricing for you to keep up with that process. I find errors fairly frequently. Now these errors are possible because there are a lot of human actions in this whole process. Now that's in a manual type of check-out stand. When you add to that process the electronic scanner you've introduced another new medium. You've introduced a medium that has a fairly elaborate software programming system and it makes it virtually impossible in my opinion for the consumer to be able to validate the process at all if they don't have an item price on each item that goes past. It just simply happens too fast and they really can't



understand that black box.

I think my method of dealing with this, enforcing it, is to right now avoid stores that use scanners because I simply, because with my experience with software programs over the years and their vulnerability, I just don't trust the system and I wouldn't trust them at all if I had no chance to validate it with a price on each item. The reality is that with today's technology in this area, the consumer needs all the help they can get and I think the SB 1654 is very important to all of us as consumers if we are going to try to validate the marketplace in some way. And after all, the consumer is going to pay the price either way. If you have any questions, I'll be happy to address them.

CHAIRMAN KEENE: Any questions of Mr. Nyman? Let me just take a moment to introduce Senators Bill Lockyer and John Doolittle. They're both members of the Judiciary Committee who have joined us this morning. Frank Kuberski and Ralph Lubick, Southwestern Regional Council, UFCW. Mr. Kuberski, good morning.

MR. FRANK KUBERSKI: Good morning, Mr. Chairman and committee members. My name is Frank Kuberski and I'm President of the Southwestern Regional Council of the United Food and Commercial Workers representing some 200,000 members and their families in the State of California.

Our Council has been testifying on item pricing now for some eight years. During this time we have repeated on many occasions that we have no objection to the automatic checkout system. We have no objection to the universal product code. We regard both as aids to our industry and also regard both as steps which will help the retail stores. All we ask in the past and we ask now is that the consumers be allowed to have readable prices on packages and cans that they purchase. Needless to say, we're also very concerned about the employment of our members. The Assembly report that was made a few years ago on item pricing stated that automation eliminating prices would take up to 8,650 jobs could be eliminated because of item pricing being discontinued. This loss of jobs would be done at a very small savings to the consumer. In fact, according to the report, as low as ten cents to fifteen cents per trip to the store would be saved by the consumer. Three years ago a compromise was reached with industry which we believe called for 85 percent of all items in the store to be marked. Clearly that has not happened. But in fact, because the law is unenforceable as it is written, most food chains in this state have violated the law to a large extent. Recently some of the largest food retailers in the country have so flagrantly violated the spirit of the law that they do not item price any merchandise whatsoever. You can take this committee just a few miles from this room to three new large supermarkets, Pak 'N Save, where no UPC coded food items are marked at all.

SENATOR LOCKYER: Who owns them?

MR. KUBERSKI: Safeway. So they should be well aware of the law.

SENATOR LOCKYER: They know the law, yes.

MR. KUBERSKI: Clearly a large segment of the retail food industry has thumbed its nose at the consumers of this state and ultimately at each and every member of this Legislature. The industry can cynically tell the district attorney to figuratively take a walk, to tell this Legislature that it drafts impotent laws, what will they do next to the consumer at the checkstand? We submit this law should be amended to make it understandable and enforceable as it originally intended.

CHAIRMAN KEENE: Thank you. Any questions of Mr. Kuberski? Thank you for your testimony. Arlene Black, American Association of University Women. She's not here. Is Mr. Perez here? Bob Perez? Okay. Les Howe, California Retailers Association. Is that Mr. Cope with you?

MR. LES HOWE: Yes, Mr. Chairman and members of the committee, this is Kenneth Cope, Senior Vice President, Lucky Stores, in charge of administration. He is also on our board of directors. I have some handouts.

CHAIRMAN KEENE: The sergeant will deliver them to the members.

MR. HOWE: I'll start off the testimony and then I'll turn it over to Mr. Cope, then back to me, if I can sir.

CHAIRMAN KEENE: Okay.

MR. HOWE: The first handout, which is the pink is a matter of identification. Let me read this, it will make it a little quicker. Mr. Chairman and members of the committee, my name is Les Howe, Vice President Governmental Affairs, California Retailers Association. As I mentioned before, this is Mr. Kenneth Cope, Senior Vice President for Administration, Lucky Stores, who will also testify.

Thank you for this opportunity to give our views on California's present mandatory item pricing law which went into effect on January 1, 1982. Beyond specifying our reasons for opposing the bill before you, SB 1654 (Senator Rosenthal), we will furnish you pertinent information on the present law and the costs it imposes on scanning stores and their customers. We hope that this information will provide a meaningful perspective on the item pricing issue as it exists today in California. In our conclusion, this is not it yet, sir, but our presentation concludes with this statement: Rather than making the present law more onerous, as you've heard testimony ahead of us today that they would propose, we would suggest consideration be given to modifying it to reduce the approximately \$50 million in compliance costs which it costs today. Why should California impose these millions of dollars of costs on scanning stores and their customers that 43 states in the U.S. do not. At this point I'll turn it over to Mr. Cope and we'll discuss the basis for our cost estimate and his experience with Lucky Stores.

MR. KENNETH COPE: Mr. Chairman and members of the committee, my name is Kenneth

W. Cope. I am Senior Vice President, Administration, of Lucky Stores, Inc., Dublin, California. Lucky Stores operates 675 food stores and food departments in nine states.

CHAIRMAN KEENE: Mr. Cope, the microphones are not very sensitive unless they are very close to you. Perhaps you could bring one of the microphones closer to you.

MR. COPE: Better? Lucky Stores operates 675 food stores and food departments in nine states. About 300 of those stores use scanning equipment to check out customer purchases. Three hundred fifty of the total number of the stores and 192 of the scanning stores are in California. California is the only state of the nine in which we operate that mandates the marking of individual packages of merchandise offered for sale. Thus we have a basis from which to measure the costs of price marking under the present California law.

Although we believe the present law places an unnecessary burden on food retailers and thus ultimately on consumers in California, we have nevertheless made conscientious efforts to comply with that law. Our analysis indicates that compliance in our California scanning stores requires about 51 hours more labor each week in each store than in a comparable scanning store in Arizona, Nevada, or any of the other states in which we operate. These 51 extra hours at an average hourly cost of nearly \$15 add up to \$40,000 a year for each store. For the 192 scanning stores we now have in California, the total cost is about \$7.5 million a year. This cost will rise almost \$9 million a year by the end of 1984 as we install scanning in another 30 to 35 of our California stores.

Food retailing is among the most intensely competitive of all businesses. For that reason there is great incentive for the food retailer to pass on the cost reduction through lower prices. On the other hand, food retailers operate on very narrow profit margins leaving little room for the retailer to absorb cost increases. He must pass them on to the customer or he will not survive.

The \$7.5 million cost of compliance with the present law, as I mentioned earlier, is already being paid by California consumers. Any changes in the present law which require more individual packages to be marked will increase that cost. There is nothing in our experience to suggest that our customers, about 2.4 million each week in our California scanning stores, care at all whether the individual packages are price marked or not. Customer complaints are rare and more often relate to marked items than to one that is not marked. There has been no adverse reaction from our customers as we've introduced scanning, either in California or in other states that do not require price marking at all. In fact, sales often increase as customers recognize the advantages of faster check-out. Price marking is simply not an issue with customers in our scanning stores.

CHAIRMAN KEENE: One technical question. Is shelf pricing a requirement today

under the law? So, it would be conceivable that if price marking were not required that there would not be any price anywhere? You would not see a number anywhere in a supermarket having to do with price? That's a possibility under law?

MR. HOWE: Well, technically, I don't think operationally your supermarket would work if you didn't have that information at the point where the customer makes the purchase. It just wouldn't work. You'd have to have it there at some point or everybody would be completely confused and completely lost. Is that correct?

MR. COPE: Well there's another reason for shelf marking, even aside from whether it showed the price or not. It is essential for the operation of the store so that the clerks stocking the shelves know where to put each individual item.

CHAIRMAN KEENE: I guess I should ask you because the case was made in opposition to Senator Rosenthal's bill at the end of the last session that there was an agreement that we would put into place a law, which was the Rosenthal-Roberti law, and that presumably implicit in that was the fact that the law would be complied with by the people you represent, and in fact there is substantial evidence that that law is not being complied with. If we find that evidence to be somewhat conclusive, we do have, it seems to me, a problem and that we are not getting compliance with the law which was also part of your agreement, I guess. What do we do about that if we don't clarify the law, if we don't increase sanctions?

MR. HOWE: Mr. Chairman, I'm going to try to cover that type of thing as I move on if you're through with the testimony of Mr. Cope's.

CHAIRMAN KEENE: Let me frame the question more specifically.

MR. HOWE: Because we will get into precisely what you are talking about.

CHAIRMAN KEENE: There is apparently fairly general noncompliance. Doesn't that disadvantage a store like Lucky's which has a fairly good record of compliance compared to some of the others? Doesn't that place you at a competitive disadvantage? Wouldn't you like to see the people who are not complying with the law who ought to be complying with it be required to do so so that you are not placed at that competitive disadvantage? This is based on the consumer testimony that came earlier that said that Lucky's was pretty high in terms of its compliance.

MR. COPE: There are many reasons why a customer shops at a particular store and certainly we have nothing in our experience to suggest that price marking or not price marking has any significant influence on that customer's decision. They shop in the store for any number of reasons other than price marking.

CHAIRMAN KEENE: I know, but if you are price marking and if the costs are what you say they are over here, then Lucky's has to charge more for its products than some other store that is not complying with the law. If the burden is as onerous as you say that it is, and if you say that all of this is reflected in consumer prices, then obviously

Lucky's, which is complying with the law or at least has a fairly good record according to the consumer tests, it's customers have to be paying more. You're placed at a competitive disadvantage. Wouldn't you seek to eliminate that if that's so?

MR. COPE: I don't know to what extent it is so. We are satisfied with what we're doing and we're attempting to comply with the law ourselves. If others are not, I don't think that's particularly up to us to deal with.

CHAIRMAN KEENE: My question is based on your testimony. You say that, let me read it here, "Food retailing is among the most intensely competitive of all businesses," that's from your testimony. "And your analysis indicates," from your testimony, "that compliance in our California scanning stores requires about 51 hours more labor each week in each store than in a comparable scanning store in Arizona, Nevada, or other states." Well, presumably, it requires more also than someone in California who is not complying with the law. And if food retailing is among the most intensely competitive and there is a great incentive for the retailer to pass on any cost reduction through lower prices, according to your testimony, presumably you would have to pass on any cost increases as well, and that would place a store that is complying at a competitive disadvantage with stores that are not complying.

MR. HOWE: Mr. Chairman, I think part of our response in this case is that there is apparently some uncertainty as to what compliance is. If the proponents of SB 1654 have one view what the compliance requirements are and we have a different view of that same thing, then you can't necessarily say we are not in compliance just simply on the basis of some random samples they took from place to place. I think that has not been determined and we will not suggest that it's not taking place, that there isn't considerable price marking going on in California today.

CHAIRMAN KEENE: Okay, but if you have two supermarkets one of which says, hey, we understand what this is all about and we're going to try to comply with it, and you have another that says, well, we can weasle out of it by not really price marking in a way that a strict interpretation of the law would require. Wouldn't it be better to clarify that so that they are both operating under the same set of rules?

MR. HOWE: Well, Mr. Chairman, I would say this and I've said the same thing to Senator Rosenthal over time, that we have no problem in terms of trying to clarify this bill and it probably could be improved, but we don't want to clarify it the way they want to do it which changes the whole bill drastically in terms of what we perceived originally and what we agreed to.

CHAIRMAN KEENE: Why don't you include those suggestions in your remaining testimony? Why don't you include those suggestions you would have for clarifying the law in a way that would not place at a competitive disadvantage those who seek to comply with the law and therefore create disincentives to comply with the law?

MR. HOWE: I'll move rather rapidly but I wanted to lay some groundwork for where we are today, not only in California but in the whole United States on this whole issue of item pricing. One that you can see from page 1 of the background that today there are only seven states in the whole United States that have a mandatory item pricing law. This is one of those things where there was a big flurry of during the 70's and very little action since that time. It's just not that big an issue, certainly not in other states. And that's why you have a limited number of states with these kinds of laws. And what I've shown here is based on the number of scanning stores that 77 percent of all the scanning stores in the country are located in jurisdictions that do not have a mandatory item pricing law. Twenty-three percent, including California, of the scanning stores are located in such jurisdictions. So, I'm saying we are the exception by even having a law in California.

Just a little background which some of you are quite familiar with is that the first item pricing bill was introduced almost ten years ago, back in 1975 and there have been 15 bills introduced on the subject and 30 committee hearings on this issue and yours is the 31st committee hearing on this issue since the first bill was introduced in 1975. So it hasn't been overlooked. I might point out, and I think it has some germaneness insofar as what the people from the Attorney General's office are talking about, we had a state mandatory item pricing law in effect from April 1, 1976 until January 1, 1980. And then this period where we had no state law and we had a number of local ordinances. And, as I mentioned before, the Rosenthal-Roberti Item Pricing Act adopted in 1981, which was a compromise. I want to make a point that that point in time when this agreement was reached roughly half of the state's population was subject to local item pricing ordinances. The other half was not. So what you ended up with in exchange, you ended up with a statewide law that covered areas of the state that were not subject to any kind of an item pricing law. So you can say that in a lot of jurisdictions today you have a law, whether you like it or not, in terms of its perceived quality that you would not have had under the situation before the agreement reached in 1981.

CHAIRMAN KEENE: But the witnesses in favor of the new bill, the bill that was in the last session of the Legislature by Senator Rosenthal, are suggesting that a law that's unenforceable is no law at all. So you say you brought law to those jurisdictions that were formerly lawless in this area, but if the law is unenforceable, what good is it?

MR. HOWE: From the testimony I didn't get the idea that it was unenforceable. What I understood was that no one's really tested that yet. And the fact that it's not, we don't really know, but it doesn't mean that the stores aren't going ahead and complying. I think generally throughout the state and no one will even pretend that it's a hundred percent because this is fairly complicated business trying to make these determinations and all. But you are getting a high level of price marking in California today state-

wide that you did not have before the agreement of 1981. Can we move to page 2? This won't take long, but to give you some idea of focusing this law into the whole industry, food retailing industry you might say. Today there are roughly 3,000 supermarkets in the state, so about 1,200 of those supermarkets are equipped with scanners. So the law applies only to those 1,200 stores. The 1,800 scanning stores that do not have this equipment are not subject to the law.

SENATOR LOCKYER: If you were to break that down by volume of sales rather than just a number of supermarkets of number of scanners, what do you think the percentages would be?

MR. HOWE: Oh, no question, Senator Lockyer, they would be higher because you pick off the larger volume stores to install this equipment. If I were going to make a guess I'd say 50-50 or it could even be 60-40 the other way, because the small volume supermarkets with a little over \$2 million annual sales would be the last to get this kind of equipment. No question about it.

SENATOR LOCKYER: For the non-scanner stores, whether its 40 percent or 50 percent or whatever the volume, what are the, what protections do consumers have in those circumstances under the law?

MR. HOWE: Well, they have no protection at all. The law applied specifically to grocery stores with these computerized check-out stands or to grocery departments in a general merchandise store, which in this case would be a Gemco.

SENATOR LOCKYER: So if it's a non-scanner store, whether the can is marked is discretionary, there's no law that requires that ...

MR. HOWE: There's no law applicable to them.

SENATOR LOCKYER: ...or a shelf price again. Now you mentioned that the supermarket doesn't function if the clerk can't read the price or the shopper know what the shelf price is going to be. But there is no legal requirement right now?

MR. HOWE: None whatsoever, sir. In other words, there are other kinds of warehouse stores. Somebody mentioned the Pak 'N Save that get into that further. There's Prairie Markets out here. Now they don't have scanners, but they don't price mark anything in the store.

SENATOR LOCKYER: What's it called? Pak 'N Save?

MR. HOWE: Pak 'N Save, I believe.

SENATOR LOCKYER: Now, they're using scanners.

MR. HOWE: They're using scanners and they should be subject to the law.

SENATOR LOCKYER: So that should be subject to the law?

MR. HOWE: I've brought that to Safeway's attention and they're investigating it, I'll make that clear right now.

SENATOR LOCKYER: Did they have to hire a private investigator? It's pretty easy



to find out what they are doing one way or the other.

MR. HOWE: They have 500 stores in the state so it's not easy to keep track of all them, I'm sure. And so are a lot of other stores, convenience stores. They're not subject to this law. If they price mark, a small grocery store in San Francisco or anywhere else, they're not subject to the law. They don't have to put any item pricing on anything.

CHAIRMAN KEENE: Mr. Wong has a question.

MR. WONG: If you're done, Senator. Has the California Retailers Association conducted any surveys on its own regarding compliance with this new item pricing law? The reason I ask is for this reason. The consumer groups have testified that their surveys show anywhere from 3 percent compliance to 62 percent compliance by Lucky's. And I'm curious if the industry has done any surveying on their own. And perhaps if you haven't, why not?

MR. HOWE: In answer to that, Mr. Wong, I'm going to say I'm going to touch on that just a little later one, but I'll give you one immediate answer. I've been in a lot of contact with at least the large chains who are our members to find out precisely what they are doing. That doesn't tell you that I know or anyone else knows precisely what's going on out in an individual store, but you can find out what their policies are and what's supposed to be going on in those individual stores.

MR. WONG: It would seem to me that since the retailers entered into this agreement back in 1981 that they would have a very strong interest in seeing that it is enforced and that the Retailers Association should take an active hand in seeing that it's enforced so that if anything, it would preclude hearings and bills such as SB 1654 for clarification. And if there was an active hand taken perhaps this hearing need not happen.

MR. HOWE: We want uniformity and I can't tell you to what extent you have it in the state, but I can assure you that there is a large degree of price marking going on in California, item price marking, throughout the whole state. I don't think there is any question about it.

CHAIRMAN KEENE: Part of the problem is that if somebody comes in with definite and specific testimony that appears to demonstrate that there is substantial non-compliance with standards and you tell us, well, compliance is better than it used to be and maybe it's pretty good. We have to regard that as undisputed until you come up with anything that challenges it. If it's undisputed, then the law, the agreement is obviously not being implemented to the degree that one might have anticipated at the time it was passed.

MR. HOWE: My response would be basically this. We feel we are in compliance with the agreement. You want to remember that what this bill proposes are things that are entirely aside and a repudiation of the agreement, and I will touch on that later if I can, Mr. Chairman.

CHAIRMAN KEENE: Well, I wish you would touch on compliance with the agreement which is reflected in the law as it now stands prior to 1954. Where is your compliance? There is evidence of apparent non-compliance. Where is your evidence of compliance?

MR. HOWE: If there is going to be this kind of examination then I would want some objective group to make this determination. I'm not sure that you ...

CHAIRMAN KEENE: We have a rule that we call the "best evidence" rule. The best evidence that we have now is that people have gone in and made purchases or at least examined the products as to whether there is compliance with the law and they say there is substantial non-compliance which ranges from 30 percent to 60 percent.

MR. HOWE: I think the key to that, Mr. Chairman, is the fact they are saying there is non-compliance according to their definition of what it should be. That's where there is some question and I'll only touch on that a little later, if I can. I'll move on. I won't get in to this breakdown here...

CHAIRMAN KEENE: All right. I'm marking down that you're going to touch on it later. Senator Lockyer, did you have anything further to pursue?

SENATOR LOCKYER: No, I think Les wants to finish his testimony and then...

MR. HOWE: Okay. And this ten-year old issue which is still alive and I think one of the things we are lacking on this thing is some perspective. This is what I'm trying to do on the yellow page 3. As stated previously, mandatory item pricing became an issue with the advent of the automatic check-out system which removed the need to place a price on each item unit to inform the clerk at the checkstand the price to ring up. The prices that were on there previously were not there for consumer information. They were for the check-out clerk's information as to what to ring up at the checkstand. They were never there for the other purpose.

CHAIRMAN KEENE: How does one arrive at that result, that the price is there for, that the price used to be there for the person at the check-out stand but not for the consumer?

MR. HOWE: From an operational standpoint, they had to have the price on each item because when it came to the check-out stand and you did not have scanner in, then a clerk had to be able to read a price on that item in order to ring it up.

CHAIRMAN KEENE: But maybe the consumer also thought that the price was put there to notify him or her of what the cost of the item was?

MR. HOWE: Well, that's a secondary factor. In other words, the situation prior to scanning really wouldn't operate unless you had these items, units or whatever you want to call them, actually priced on there purely because that information was needed to ring up at the checkstand. The fact that the consumer used it, that was fine. But that was not why they started the process. No one's really mentioned too much about this, but it shouldn't be overlooked in terms of the legal aspects that have been brought forth.

This issue is not one of the accuracy of the system as there are specific Business and Professions Code provisions that apply to all retailers in respect to such violations. In other words, Section 12024.2 has to do with selling an item for more than advertised price and if you've got a scanning store, you're subject to this just the same as everybody else. The same is true of selling packages under declared weight, if your package in the store is underweight. So your regular B&P sections apply as far as that is concerned and has nothing to do with the scanning requirements. Here is the real key as far as we see it. The price information that is now provided by scanning stores.

First let's talk about those items that are now exempt. The first time, we're talking about the amount of information the customer receives, first the customer receives the information at the shelf. Here's a good example of some. You're all familiar with that. In some cases, Lucky doesn't do this, but some chains also provide unit pricing information. Two, when the item gets to a checkstand and the price information is furnished on the screen, the visual screen there, that's the other place. Then there's a detail receipt tape that goes into the grocery bag. So that's three times. Three times on any one item unit that you have provided the price information.

Now when you get into the item pricing issue you are saying that three times is not enough. You have to do it the fourth. So when you say it has to be price marked, you're saying this information has to be furnished the fourth time. The point we're trying to make is that we've provided the price information three times to the customer and having to price mark it a fourth time the price is shown. So the real issue in all of this is the cost versus benefits of providing price information this fourth time. That's the issue, the fourth time you've provided price information. I'll move on to the other.

Number 4, the salmon colored one here. I think this is a very important part of it. We're trying to give some perspective as to what really goes on in a supermarket. Let's take for example, and this is fairly standard and Mr. Cope will back me up as far as real knowledge on this thing, but I've been through it the full ten years. Let's take 18,000 items in a store and there's where we get into definitional problems. An item the way the bill has always been interpreted, same thing. Lady Lee cut green beans is an item and one of these is a unit of the same item. That's where some of this confusion arises. So there are basically, and this is a standard supermarket store, 18,000 items in that store. This and all like it are the same item. That has already been standard nomenclature and what we've dealt with in all the other item pricing bills. Now of that 18,000 as is in the current law and the same is true in all the other item pricing bills that we have, which were SB 32, a whole plethora of them, and they were in effect some time before the AB 65 passage in 1981. We estimate, and obviously it will vary from chain to chain, store to store, depending upon the size and all, that roughly 10 percent of the items on the shelf are items that are not price marked in non-scanning

stores. These are the specific exemptions that are in the bill, AB 65, and were basically in all of the other bills.

And if you'll look to Exhibit B there is a list of all those things, all those items that are now required to be price marked. It has nothing to do with the 15 percent. These are the exemptions you make in order to place a scanning store first on a parity with a non-scanning store.

CHAIRMAN KEENE: And you're suggesting that those green beans, the two cans of green beans qualify as identical items within a multi-item package?

MR. HOWE: Well, you don't really package beans, but there must be other ...

CHAIRMAN KEENE: Then how do you fit under that exemption? How do you put the green beans under that exemption or under some other exemption?

MR. HOWE: I'm not sure I'm catching you.

SENATOR LOCKYER: They aren't.

MR. COPE: The green beans aren't said to be exempt under one of the listed exemptions.

MR. HOWE: These are specific exemptions that were in the early bill, even before, these are the things that if you go to a grocery store that does not have any kind of scanning.

MR. COPE: Those were not exempted.

CHAIRMAN KEENE: The green beans were not exempted?

MR. HOWE: No. I didn't intend to indicate that these were exempt under that. I'm sorry. This was just to indicate the definition of an item. I'm sorry, I did not mean to...

CHAIRMAN KEENE: Okay. Those are not two items then, the green beans, under the definition? They are one item?

MR. HOWE: They are one item.

CHAIRMAN KEENE: So if you sell a million cans of green beans in a year they are all one item?

MR. HOWE: They're all one item. That's the type of thing. For example...

CHAIRMAN KEENE: And if you sell several dozens cans of something else, that's also one item?

MR. HOWE: Right. If you look at the bill, even the way the bill was before we reached agreement, it referred to, and you quoted earlier, units of the same item. This is a unit of the same item.

CHAIRMAN KEENE: So by pricing a low sale item, something that sells at very low frequency, and not pricing something that sells at some very high level, you've in effect marked 50 percent of those two items? You satisfy 50 percent requirement even though the items that's marked is a very low seller and the item that is unmarked is a very

high seller?

MR. HOWE: I'm not sure I'm articulating this very well. We're looking only at this point the so-called specific exemptions. Those are the ones that are named right in the bill. These are exempt and they have been, as I say that's been pretty standard in all of our item pricing bills from the very beginning. In other words, if you didn't have the 15 percent exemption, you'd still have all of these items as they are specified in Exhibit B that do not need to be price marked. The basis of that was that they are not generally price marked in a conventional supermarket.

CHAIRMAN KEENE: Okay. Before you get to the specific exemptions we have three categories. We have one which is the definition of what an item is for purposes of the 85 - 15 percent. We have that definitional issue. We, second, have some specific exemptions which is subsection (b) of AB 65 on page 3 of the bill. And then you have the 15 percent exemption itself?

MR. HOWE: Well, technically, it says 15 percent, but you see you deduct out your, the way it works, I made the computation down below, you have the 18,000 items total. Then you deduct out your specific exemptions which are 1,800, about 10 percent of that which is in the store, are specifically exempt. And after subtracting out the 1,800 you get 16,200. Then the law says 85 percent of that shall be pricemarked and computation-ally you come down to the fact that of all the consumer commodities, 15 percent equates to 13.5. Now this does not get to the question of, the point I'm trying to make here is that in these 1,800 items, for example, a lot of those are high velocity items. For example, the sale items. The law says as a specific exemption, and I know the Senator will check me on all of this, that if an item is on sale not more than 14 days, it's not to be price marked. It's generally not price marked in a conventional supermarket. That's the basis for these exemptions. So you can have a lot of things that are not price marked simply because they are specific exemptions. It doesn't have at all to do with the so-called 15 percent exemption; particularly when you take into account sales items and so computing this you're saying 15 percent exemption give you roughly maybe 2,430 items that do not have to be price marked under that. That's not a lot more than what you have in specific exemption and again, those will be high velocity items, units that will go out of the store pretty fast. I'm not, and I misunderstood all the way through.

SENATOR LOCKYER: Is someone asserting that the correct understanding of item should be each single thing? Was that claim made earlier or is that someone's view of what the legislation says?

MR. HOWE: No, that's the way the bill reads now, SB 1654, Senator.

SENATOR LOCKYER: Okay. Maybe I need to ask it in a different way. Is someone claiming that the 1981 compromise was unclear as to the definition of an item or do they

simply have a better idea of how it should work? Do you know what I mean?

SENATOR ROSENTHAL: It was not the intent of the law.

SENATOR LOCKYER: Okay. So as the author of, weren't you the author? Yes. You thought at the time that when they talked about that restriction that it was going to be every single can or whatever would be counted for purposes of determining what was the 15 percent excluded and the 85 percent covered?

SENATOR ROSENTHAL: Yes. And just to follow up on that, my understanding, I thought that that was going to be the case and if we exempted 15 percent, that was to enable them to operate more efficiently. I didn't realize that 15 percent was 70 percent of their grocery volume.

SENATOR LOCKYER: Is that what someone's determined?

SENATOR ROSENTHAL: That's approximately what it is. So you can walk out with a whole basket full of groceries and nothing's priced. The things that they've priced, for example, will be shoe polish or a bag of string or the non-grocery items. Because you can walk down row after row after row of groceries, cans and boxes, and what have you, and nothing is priced.

SENATOR LOCKYER: But you can buy an iron or something?

SENATOR ROSENTHAL: Yes, you can buy a tire. You know the markets sell all kinds of things other than just food and that's where the ...

SENATOR LOCKYER: What is the language in the existing law that even talks about items and how that gets done? As I read the beginning statement it says...

SENATOR ROSENTHAL: This one has not been amended. You can see by the scratch out in 1654 what is existing law.

SENATOR LOCKYER: That is what I'm trying to look at, yes. And the existing law says if you have a check-out system as we're describing, you have to have a readable price on 85 percent of the total number of packaged consumer commodities. Total number of packaged consumer commodities.

CHAIRMAN KEENE: That's either three items sitting on the table or two items depending on how you interpret.

SENATOR LOCKYER: And it doesn't say item and it does say total number of packaged consumer commodities. That sounds to me like, unless perhaps Mr. Howe or someone can tell me how I'm wrong, it sounds to me like that says every item or unit argument is interesting or irrelevant. That when it says total number of consumer commodities that it means every single thing, every can.

MR. HOWE: That's the universe it establishes, I think, as far as the store. But just to make, what's a little awkward from this perspective is that all of this language that we're talking about, with maybe some relatively minor exceptions, is language that was in the old law, the old state law. And they were drafted by the

people who are now complaining about it. We drafted hardly any of this.

SENATOR LOCKYER: But my point is that it seems to me that they drafted that consistent with their intent, that is the two cans or the 200 cans of beans don't represent one item, but part of the total number of packaged consumer commodities, 15 percent of which don't need to be marked. Can you show me some statute or something?

MR. HOWE: Let's take a look, and this language was in SB 32 long before AB 65. It's the struck section - are you looking at the new bill?

SENATOR LOCKYER: I'm looking at the new bill just to understand the current law. I'm looking at the current law, Les, that was in AB 65. I don't mean to be unnecessarily analytical about all of this.

MR. HOWE: No, I think this is the key because you've raised a very good question in the one situation that we rely on. If you'll look at page 5, Senator, "b", and I'm looking at the strikeout, ... "failure to have a clearly readable price indicated on 12 units of the same item." So they have in this bill and this was not changed in any part of the compromise, this was in the previous bills, they said 12 units of the same item. I think that is key in this whole discussion.

SENATOR LOCKYER: Okay, that would suggest that there is something called an item which refer to the 200 cans of green beans, and individual units, okay, at least for purposes of enforcement. But where does it suggest that 85 percent of the items are to be marked rather than 85 percent of all the stuff? I mean the fact that you enforce it that way...

MR. HOWE: My point is, and this is nothing new, they have recognized in that section that there are units.

SENATOR LOCKYER: I agree, however, the requirement of the statute is to mark 85 percent of the total number of packaged commodities. It doesn't say 85 percent of the items. It doesn't also say, you're right, say 85 percent of the units. It doesn't say either. But it seems to me that when you say 85 percent of the commodities that that sounds like it refers to everything, not something called an item of which 85 percent happens to be part of.

MR. HOWE: The basic response to that would be that doing it that way would make it almost totally unworkable and would put the store in a position far worse than if you had no law at all, I mean no exemptions at all.

SENATOR LOCKYER: Explain that to me.

MR. HOWE: Well, maybe Mr. Cope can explain it better, but my impression is that I don't know how you would make a determination. For that 18,000 what we call items, there are roughly 400,000 item units in that store. And that fluctuates immensely up and down, day to day. How would you determine which of those are subject to this?

MR. COPE: May I comment on that Senator? A typical case of grocery merchandise



may have 24 cans in it. If you have to mark 85 percent of the 24 cans when you put it on the shelf, as a practical matter there is no 15 percent exemption because first you have to figure out what 15 percent of 24 cans is and while you're doing that you could have marked the other two. Also...

SENATOR LOCKYER: Pardon me, Mr. Cope, but I'm assuming that we're not going to mark some of the cans and leave some of them unmarked. It would seem to me that it would still relate to maybe items so you'd follow you're existing practice, but that it would probably be a smaller exemption calculated against the total number of units in the store rather than the total number of items in the store. Does that make sense? I don't want to argue about having some of the green beans marked and some unmarked. That doesn't seem to make any sense to me so you're current method of operation, that is not marking some items, but it's a percentage of the total units that the exemption would apply to?

MR. COPE: Well, if the exemption applies to the total number of packages, the total number of packages on the shelf, then of course a 15 percent of the total number of packages is an extremely small exemption compared to 15 percent of the individual stock keeping units or the individual. If both of these cans of green beans are a single item, the number of items as Les mentioned earlier is perhaps 18,000 or something like that in a store, the number of individual packages in a store would be 200,000, 300,000, 400,000. Fifteen percent of that number of packages is a very small individual exemption. It certainly deprives the customers of a lot of the benefit of the cost reduction that could come about from marking fewer items.

SENATOR LOCKYER: Well, that's the policy point I'm trying to get to. It seems to me the statute is somewhat ambiguous and an argument could be made for either one of the claims about how it works, but whether it's 15 percent of them all or 15 percent of items, how do we get to 15 percent? That was again asking about history, just kind of in your mind, Senator Rosenthal, a matter of administrative convenience or ...

SENATOR ROSENTHAL: Yes, that's correct. As a matter of fact, that final amendment, the 15 percent was to try to meet them somewhat halfway in terms of their operation, that they didn't have to item price everything. But I think the consumers and I certainly were really hoodwinked. I really believe that sincerely. I did not know that the 15 percent they were talking about in terms of items represented most of the groceries they sell, except those that are sold occasionally. It represents 65 or 75 percent of what a consumer carries out of the market each week that they buy regularly.

CHAIRMAN KEENE: The 15 percent is attributed to the very high volume items? The 85 percent to the lower volume items?

SENATOR ROSENTHAL: That's correct. If you bought a bar of soap, for example. You don't buy a bar of soap every day, you might buy coffee, or something else, or a can of

soup every day. So that's...

MR. COPE: If the argument for item pricing is to provide the customer with the information about a price she might not know, she is most likely to know the price of those things she buys every week, those things she buys frequently and in quantity than the ones that she buys infrequently. If the purpose is to provide her information about a price she may not be familiar with, then the less frequently purchased items are the ones that should be marked, not the most frequently purchased.

CHAIRMAN KEENE: At least it demonstrates a difference in understanding over what the provisions of the law were that was passed several years ago. That the author believed it to be 15 percent attributable to the total number of packaged units. Whereas you are interpreting commodity not to mean units, but to mean a line of items or something similar to that. That's an incorrect statement?

MR. HOWE: Mr. Chairman, I'd like to add that that's the practice in all the other states that have item pricing laws. In some cases they have these kinds of exemptions. This was the way it was done under the previous laws, that this was an item. I don't know where the breakdown came in communications but that was standard practice because no one could really imagine how you would deal with this problem that you're talking about 400,000 separate units in a supermarket. It just doesn't work. Those can go up drastically from one hour to another. You'd have to have something fairly stable like the number of items which you sell, which is reasonably stable, to even work with this issue. You can't work with anything as volatile as the total number of units.

CHAIRMAN KEENE: It's very interesting. We have a dispute as to what the existing law says. On the one hand there is a legislative responsibility to clarify that. On the other hand the prosecutors have certainly been working with you to not bring any actions to see that it gets clarified in the courts, so the thing stands in a state of ambiguity right now.

MR. HOWE: Could I summarize?

CHAIRMAN KEENE: Sure, unless there are some other questions.

MR. HOWE: This about wraps it up. I'll read it, it's probably quicker that way. The 1981 Rosenthal-Roberti Item Pricing Act resulted from a compromise negotiated by the proponents and opponents of AB 65 (Rosenthal). If you would turn to Exhibit C that indicates exactly what the items were as a background in the negotiations. As an example, one, we asked that the scanning grocery stores would price mark at least 75 percent of the non-exempt items. The compromise agreement was 85 percent, not 75 percent. So we didn't do as well as we would have liked to. We wanted the 7-day limit on sales removed entirely, we got a 14-day limit. There was a change in the new definition of automatic check-out system. That was changed simply to reflect the author's intention. We wanted to pre-empt the existing local ordinances and that was necessary, obviously,

in the new statewide law. And we wanted an update in the small-item exemption. We wanted to go to fifty cents, it went to forty cents. We wanted the law sunsetted and the other side did not want the law sunsetted so it wasn't sunsetted. And the penalty provisions that everybody is talking about here were in this bill from the very beginning. We didn't put them in there. And no one at the negotiations even suggested that any of these penalty provisions be changed. These were put in by the author of the bill. The ones the people are saying aren't doing the job. So they weren't even on the table as far as negotiations simply because no one offered any complaint. So I just want to give you some background that we gave quite a bit and it's rather disturbing to find that those who were a part of that are coming back and saying well, we didn't really mean it. So we see that as a repudiation of that agreement. Eliminating in effect the general exemption that allows scanning stores to not price mark approximately 15 percent of the items in addition to the specific exemptions. That is a repudiation as we see it.

Drastically revising the penalty provisions contained in the present law and as I say, those very provisions were in the old law, or one of the old laws. The point is no one to my knowledge, even under the different penalty provisions in the former laws, ever took any action on an item pricing problem. Even today, it's only an infraction for minor pricing violations. The real question is how severe should the penalties be for failing to provide item unit price information the fourth time. You've already done it three and you failed where maybe you should have done it the fourth time. Now, how seriously have you harmed that consumer and how severe should the penalty be? I'm not an attorney, but I don't know.

CHAIRMAN KEENE: Senator Doolittle for questions first and then Senator Lockyer.

SENATOR DOOLITTLE: Mr. Chairman, it seems to me that I've heard a lot of arguments over this item pricing issue beyond the ones we've heard today. I came in late and maybe I missed it, but have there been public complaints about the administering of this act? Is there evidence of that? Who's unhappy?

CHAIRMAN KEENE: Basically the testimony came from consumer groups that argue that the law is not being complied with, that's it's too ambiguous, and that the sanctions are not effective. We heard from one person who was formerly connected with a consumer group who no longer is and holds himself out as a consumer. That's sort of the range of testimony we've had.

SENATOR DOOLITTLE: Okay. I know I haven't received any complaints as a legislator. It is interesting because we used to have a market, and there may be another one, I'm not aware, and they had the scanner and boy it worked great. In fact I wish we had more of them because they're a lot more convenient than the ones that have the old system. But it's just interesting to see the reality beyond the testimony we hear in these

hearing rooms. And this issue has been beat to death. I don't see anybody that is really being hurt by it. I haven't heard any complaints. I did miss what testimony there was but it sounds as if it was fairly weak, at least in an ambivalent nature. I didn't agree with the item pricing compromise that was passed. I think I was one of the few that voted no on that, and the others who support this certainly have a right to this hearing, but I just offer those comments. It seems to me today that testimony from the stores indicating out of all the stores around, I guess there's been only one complaint, Lucky, Alpha Beta? Somebody had one complaint. Alpha Beta I think I read. So I just offer that as my perspective of this hearing. I haven't said much during the hearing but it seems to me this pretty much says it all and thank you for the opportunity to reexamine these issues, Mr. Chairman.

SENATOR LOCKYER: I'd like, Mr. Chairman, to just spend a moment on the enforcement provisions in current law or what's recommended here to try to understand how they're different. Perhaps someone from the Attorney General's office or consultant would be helpful in going through those provisions.

CHAIRMAN KEENE: Maybe we can get Mr. Reiter and Ms. Geisberg and Mr. Shireman. Why don't you come up.

SENATOR LOCKYER: While you're doing that, Mr. Howe, you mentioned there was an assessment of non-compliance. You think that ought to be done by a neutral group. First question, do you think there may be a need to check that compliance issue, and secondly, if so, who would be a neutral group who you would have confidence in.

MR. HOWE: It doesn't occur to me offhand, Senator. This is the next point I was going to get you, but you've been laboring in this legal vineyard pretty thoroughly.

CHAIRMAN KEENE: But doesn't it relate to that question, Mr. Howe?

MR. HOWE: No, I don't believe it does.

SENATOR LOCKYER: You don't see a need to check for compliance.

MR. HOWE: It still comes back to the point that if you individually as senator go into a supermarket and you talk to the man, he doesn't even know who you are, and you ask him are you getting any complaints? I've done this myself. Are you getting any complaints so far as to the degree of item pricing that's taking place in your store. Is anybody taking a look at the list you have published out there of the exempt items? They say, we never hear a word. From the store's standpoint they can't understand why you even have all of this as far as, I'm just talking from the individual stores, just go in and talk to any of the managers.

CHAIRMAN KEENE: Okay, but earlier you were standing by this agreement and saying that there was an agreement that this was the law, these were the definitions, these were the sanctions, and now you're saying that maybe that agreement is not being complied with but since there aren't any complaints we don't have to bother to find out.

MR. HOWE: No, Mr. Chairman, what I'm endeavoring to say is to the best of my knowledge we are living up to the requirements of AB 65 as we understand them and as we understood the agreement was. There is no question about that.

CHAIRMAN KEENE: But how do you know that. How do you know that individual stores which are using these machines are complying?

MR. HOWE: I don't know that anyone anywhere could make that, 1,200 supermarkets throughout the state and half of these are owned by one person, one firm, how are you going to go out and say that anyone would be in a position to know precisely the degree of compliance in any single store. All I'm saying is that it's costing one bundle of money, about \$50 million in the state today to keep this thing going as we interpret it.

CHAIRMAN KEENE: But Mr. Howe, you're continuing to make your strong points. I'm questioning you about the points that may not be so strong and you cannot guarantee compliance in each and every store, you can't check it out, but you can do a rough sampling of the various stores as the consumer group has done, and come up with some numbers that say yes, we're living up to the agreement, or were not living up to the agreement, and we have to come up with a plan for compliance.

MR. HOWE: I have been in considerable contact with our members concerning this and they believe and they hired people to go around and monitor their stores. It's not just sending out edicts that this is the way it's supposed to be done. What I can't tell you and I don't think anyone in the world can tell you is that on a given day if you go into a store and say that they are 100 percent in compliance, because if you go into that store and have the list and everything else, you'll find that's a very, very tough task to do.

CHAIRMAN KEENE: How do we do other than accept Mr. Shireman's figures suggesting a fairly low level of compliance when we have nothing to dispute those figures?

MR. HOWE: The first thing, Mr. Chairman, is to find out what criteria he is using to make his determinations.

CHAIRMAN KEENE: Okay, let's find out. Mr. Shireman, what is your definition of how many items are sitting over there on the table, two or three? What do you see?

MR. SHIREMAN: The way we did our survey, actually I can't even answer that. We didn't use any strange definition of item. What we did was take the average consumer shopping basket of products and what we would have done - green beans may have been on the list of all the items that were checked in a particular store, so we would check green beans once. So in a sense, I guess it's in between somewhere, but there was really no definition of item or product of consumer commodity used. What we wanted to check was to see what percent of the average consumer's shopping basket was item priced.

CHAIRMAN KEENE: In terms of dollars or weight?

MR. SHIREMAN: In terms of individual items and so that would be three, except you

wouldn't have bought three of one kind of product, but you're right, that would be three.

CHAIRMAN KEENE: So they argue that those are two items over there and therefore there is compliance under their definition. Would you argue that there is non-compliance under their definition rather than three?

MR. SHIREMAN: I think that probably even under their definition we could argue non-compliance but the difficulty would be I would have to bring to court 1,800 or 18,000 different, they would call them items, I would call them products, to prove non-compliance with the law under their definition. And it's similarly difficult under our definition.

SENATOR ROSENTHAL: Mr. Chairman, may I? If you take 20 items, you take soup, you take cereal, you take beans - 20 items and you go into 20 different stores and you find in one of the stores as low as 3 percent of those items marked as high as 60 or 65 percent, and it's kind of interesting that the one speaking for the industry is one of the better ones, and I'm aware that they are because I've gone into their markets and they do price more. As a matter of fact, they even have an interesting way of doing it in which they say everything in this row is not priced, and everything in this row is priced. So you get an idea of what they are doing. You go into other markets and walk down a whole aisle for example, and one item in a whole aisle will be priced. But if you took the same items, 20 items, and walked into 20 different markets and you found that they were in compliance by 65 percent and Ralph's was in compliance by 3 percent, well then you would try to figure out what compliance means? And that's the way they've tried to do it. Now that may be faulty, maybe you could devise a better system, but the representatives of the markets cannot tell me or tell anybody as far as I can see, that the market that only did 3 percent of those 20 items as compared to 60 percent of the 20 items are both in compliance.

SENATOR LOCKYER: But the problem you have, if I may, is when you do the shopping basket analysis it's not the whole store. So that's the bias you get in the sample.

things that are going to be in the shopping basket and that raises the consumer issue of whether you're marking the wrong things.

SENATOR ROSENTHAL: But Senator, if each market can interpret the law differently, then how is it anybody is going to be able to check on whether or not the law is in fact working?

SENATOR LOCKYER: That's one of the reasons, Mr. Chairman, I thought that Mr. Kuberski should respond on a remedy question, and that is and this may be the best way the enforcement occurs, that is the current law requires the list be made available to the designated representative of the appropriate local union. Are those lists, have they been made available to people to double check what is getting priced and what isn't?

MR. KUBERSKI: In some cases starting way back when there was a real list obtained. In many cases, or in a lot of cases I should say, a list was not available or presented. And in other cases, our local unions were informed that if they desired a list it would be in their home office, such as up in Utah or some place like that, if they wanted to come up and get it. It was not provided other than that.

SENATOR LOCKYER: The law says posted in a prominent place in the store 7 days prior to the item. So you're suggesting even that hasn't been complied with?

MR. KUBERSKI: That's right. That's for the consumer and posted in the store. In many cases it's kept in the store manager's office.

SENATOR LOCKYER: It seems to me, Senator Rosenthal, that the best kind of enforcement is going to be that kind of private action. If you're wondering who's going to check and who knows the system well and who's going to follow up, but if this isn't happening then obviously ...

SENATOR ROSENTHAL: I don't think today that that's a major problem. I think the major problem is that there is a list but it's not at the checkout stand. It's not where people are paying their money.

SENATOR LOCKYER: I'm sure glad that when I'm standing in line they are not going over the list there.

SENATOR ROSENTHAL: It seems to me that if we had that where it had to be at the check-out stand the markets would change their whole tune.

SENATOR LOCKYER: I'd shop somewhere else, I'll tell you that. Les, did you want to respond to this list business?

MR. HOWE: I think one thing that as far as a list, maybe Frank has a better idea about how well the supermarkets are doing on that, but all the stores I have been in have presented a list in one form or another. Again, that is not all of them. You'll note that in this bill of the Senator's here he removes the requirement for that list, I believe. Am I right?

SENATOR LOCKYER: They don't think it's necessary, I guess.

SENATOR ROSENTHAL: It's not necessary if you're going to item price.

SENATOR LOCKYER: If you item price everything then you don't need a list.

SENATOR ROSENTHAL: Another couple of comments. The visual display and it is a good display, but I tell you that you cannot stand there because the cashier is placing it over there as fast as he can and even if you are familiar with what it is you're looking for it's difficult. By the time you think, hey, coffee was supposed to be \$.69 and they charged me \$.71, you're on to the next item. There is just no way you can stop it and say hey, what is the price of coffee? Now maybe some consumers ought to start doing that. What was the price?

SENATOR LOCKYER: This is when you think that the code is inaccurate compared to a shelf price?

SENATOR ROSENTHAL: Yes, that's correct. That's the reason. You may take something off the shelf which is \$.61, and now it's flashed on that visual recorder \$.63.

SENATOR LOCKYER: Let me ask that. In the surveys you conducted, were there inaccuracies between shelf price and coded price that you found?

MR. SHIREMAN: We did look at the shelf pricing. We did find a number of problems with shelf pricing. This is only in Los Angeles area stores, we looked at 519 product variations in 8 stores in the Los Angeles area and we found 124 errors. Fifty-five of them were incomplete labels. We were looking at the unit pricing, that's where the consumers were not told either the product name, size, total price or unit price. So in other words, it may have been difficult to tell which product the shelf price referred to. In 48 of the cases the unit price was incorrect or was inconsistent with the price that was marked on the item. The remaining 21 errors were cases in which the shelf tags were in the wrong places or missing altogether. So we did find significant problems in the shelf pricing area in terms of the consumer being able to tell what is the price of this product that I find right here, where is the shelf tag for this size, or is this a different size?

SENATOR LOCKYER: If I understood you most of those were the unit pricing, that is being done voluntarily that tells you how much it is per pound?

MR. SHIREMAN: Right, but that was when we were looking at shelf tags.

CHAIRMAN KEENE: Senator Doolittle.

SENATOR DOOLITTLE: One of the things that struck me, Senator Rosenthal, when I experienced the unit pricing was for the first time it called to my attention the individual prices of those things that were being run so maybe I had a different experience than you did, but I don't recall if this had the voice along with the visual display or not, but I thought gee that's really convenient even though what the price is, it goes through more so than if they were just checking it off the old way. The checkers I think do a pretty good job, the old way, but I would say if we're going to look at these figures we're going to also have to look at the possible error rate as they translate the price that they see into the cash register. Because at least one thing we know with this machinery there wouldn't be an error of this kind. There might be an error of another kind.

SENATOR ROSENTHAL: No, the error is not the machine. One of the problems, and you can relate it to your own credit card bill that you get, the gasoline card bill that you get, the bank statement that you get. I don't know of anybody that doesn't have something to compare with what they actually did and find mistakes so that there is no way you can find a mistake after you left the grocery store.

SENATOR DOOLITTLE: But you get that printed receipt.

SENATOR ROSENTHAL: That's correct, but you don't know that that was the price here



on the shelf or that that was the same price in the computer that was on the shelf. You have no way of knowing that at all. So that any mistakes - I have stood in a market - I saw a woman stand at the end of the counter and on the top was a piece of cheese and she picked up the piece of cheese and she said, what's the price on the piece of cheese? She said \$.41, but the computer here said \$.44, okay? Now the cashier said I'm sorry and opened up the cash register and gave her the \$.03. There was no problem with that. How many people bought a piece of cheese that was wrong? If the price had not been on the cheese she would not have known that she overpaid for it, or underpaid for it.

SENATOR DOOLITTLE: Well, I guess my comment just would be that if that happened enough you would find more complaints but there really aren't complaints over the whole thing.

SENATOR ROSENTHAL: But people don't complain generally. Now if you want to find out whether people are unhappy with whatever takes place, you really have to probe to find out whether such is the case or not. I guess that if the consumer perceives that they are not being protected by the law, if the industry wants to broaden the exemption, if as the industry has testified it is costing them \$50 million, if law enforcement is being put in a position of having a vague law to enforce, if the enforcement is up to the consumer going to a small claims court and the industry doesn't want to clarify the law, then maybe the answer to me would be to repeal the law. Because if in fact it's not working, either as good as they would like it to work or as good as I would like it to work, why do we need it altogether?

SENATOR DOOLITTLE: I'll vote for that.

SENATOR ROSENTHAL: Okay.

SENATOR DOOLITTLE: I can't stand all this consumer protection. Leave me alone.

SENATOR ROSENTHAL: That's all right, then we'll leave it up to the locals. In other words if the people in San Francisco are unhappy with what is happening they'll go to their board of supervisors and get it changed, which is what happened previously before we had this uniform law which was supposed to solve everyone's problems. There were 55 different ordinances all over California in cities and counties and they couldn't work with it. They needed something that was uniform. But it's now so unenforceable and so vague in terms of what it is even the market's interpretation is not the same, from one market to another. If one market says 3 percent of our items that go out are marked and the other one says 65 percent is, their interpretation is somewhat different. So unless we could make something where everybody is looking at the same thing in the same way with some penalties that are available if they are not working, then maybe we just ought to remove it from the law because it's not working.

CHAIRMAN KEENE: Okay, that's another option.

SENATOR LOCKYER: Mr. Chairman, I just want to try to understand the proposed pen-

alties in the bill. If you would look at page 4 and 5 that would speed it up. Currently the law provides for \$25.00 to \$500 fine for intentional violation of this act and then there is this presumption about 12 units constitutes a presumption of intent to violate. Each day is a new separate violation and they can bring an action for an injunction. That's the current law, right? Now those are all stricken under the terms of the bill and instead you have an injunction that's in the current law, recovery of damages - what would that allow? Does current law allow recovery of damages? Anyone?

SENATOR ROSENTHAL: Repeat the question.

SENATOR LOCKYER: I'm trying to compare the current law on what you permit here to punish...

MR. REITER: One of the critical differences in the proposal of SB 1654 would be to allow anyone who is bringing an action to allow reasonable attorney's fees costs if they prevail. This would enable them to ...

SENATOR LOCKYER: I understand. Is that the only difference? How, for recovery of damages when we say that the remedies set forth are exclusive in the current law?

MR. HOWE: They would repeal that too, Senator.

SENATOR LOCKYER: Yes, I understand that.

MR. REITER: Also Senator, under SB 1654 it would be possible to have multiple plaintiffs bringing an action so that if a number of consumers were affected by those policies they could join together and ...

SENATOR LOCKYER: You can get a class action under this but you can't under the old law?

MR. REITER: That's right, the old law expressly prohibits class actions.

SENATOR LOCKYER: How does it do that? Where is it specifically?

SENATOR ROSENTHAL: Section 7104 which is scratched out.

SENATOR LOCKYER: Okay, the exclusive remedy provision is what would eliminate a class action, is that right? There's no argument about what that does. So you have a civil fine and an injunction. That's all you can do under the current law? At fifty bucks.

CHAIRMAN KEENE: It's really 7102 in existing law.

SENATOR LOCKYER: Yes, 7102 has the fifty dollar damages.

CHAIRMAN KEENE: Also the provision that is applicable only to actions for a single action, not multiple.

SENATOR LOCKYER: Not multiple, okay. Unintentional errors, you changed that. Is that it? So we're really talking about a class action more than anything and recovery of attorney fees.

MR. REITER: For private actions.

CHAIRMAN KEENE: Let's try a couple of observations here. The first of which is

that I think there is a sufficient demonstration that there is a deficiency in existing law with respect to the 85-15 percent standard. It is being interpreted in manners that are poles apart and somebody's right and somebody's wrong, and I guess there is some legislative responsibility to at some point deal with that particular imperfection or let the courts do so. The other observation that I would have is that because of that disagreement over what the rules of the game are and what they require, there is no way to know whether there is compliance or non-compliance. But there certainly has been created a suspicion of non-compliance with the law even if you take the interpretation that the retailers have and the reason for that is that there are such major discrepancies in the way certain stores are responding to the requirement. There are major differences even under your interpretation because you can't talk about 3 percent and 70 percent in the same sentence and say there aren't major differences in compliance and that a 3 percent person is not under a shadow of suspicion of non-compliance, even under your definition, Mr. Howe.

MR. HOWE: Not knowing the exact particulars, he goes out with a list.

CHAIRMAN KEENE: If it's not going to be an exact response, I don't want to be interrupted at this point.

MR. HOWE: The only thing I think that I would like to make an exception to in terms of what the meaning is of the sampling that was done by this gentlemen from Cal PIRG because I'd like to know how this thing works.

CHAIRMAN KEENE: But my comment is not that they have a valid system of sampling. My comment is that no valid system of sampling is possible so long as there is a substantial disagreement and there is a need for such because of the possible range of discrepancies in responding to what the requirements of the law are and whether it's under your definition of the 15 percent or whether it's under the other definition of the 15 percent. There is enough suspicion in my mind of non-compliance that we ought to, it seems to me, develop some agreement over what the standards are and figure out a way to enforce it. Maybe some mutual task force that goes in and says look, let's see what's happening out here, and samples not each of the stores necessarily, but does a random sampling that's fairly creative by people who are experts in the field.

The third point that I find really quite shocking arises with respect to the attitudes of the consumer law enforcement alliance in this respect. I think the amount of contempt that you are showing to this Legislature in saying look, you have passed a Mickey Mouse law that is so full of imperfections that we're not even going to bother with it, we're going to assume it doesn't exist, and yes, our excuse is as every other public agency's excuse is when they don't want to enforce or implement the law, we have other priorities and only a limited amount of resources. I find that position a position that is inexcusable in this instance. That you have failed to bring a suit

under this and try to get an interpretation that might have resolved this ambiguity in the courts. That you have failed to bring actions to try to get the law implemented for repeated violations, if that's the case, for the provisions that are provided under AB 65 and existing law. I know enough about the prosecutorial game to know exactly how it works. I've been involved with it and you would like laws to come out of this Legislature that are very simple no matter how complex the subject matter and you would like the sanctions to be very tough no matter how appropriate or inappropriate they may be, proportionate to the level of violation, because you don't want to take cases to trial. Nobody wants to take cases to trial and if you create enough risk for people you don't have to take cases to trial, they'll plea bargain, or in this case, they'll settle at some level. But you haven't tried to enforce this law and that to me is shocking because you come back to this Legislature and say yes, there are some problems with the law but we're not going to try to deal with those problems in the courts, we want you to be more specific and the best evidence that we can give you of the need for this is that the law is unenforceable although we haven't tried to enforce it. I think that you have some culpability in this whole issue insofar as the general public and consumers are concerned in enforcing the agreement.

Those are the observations that I would have. I would like to see this law work better. I would like to see it better defined and before increasing sanctions, however, I would like to know what the level of compliance is. Anything further from the Members? Mr. Kuberski, did you have anything further that you would like to add?

Thank you very much for your attendance. A transcript will be available in a reasonable period of time, we hope. Thank you very much.

SENATOR ROSENTHAL: Thank you, Mr. Chairman and Members.

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October 9, 1984

OF COUNSEL TO  
STEARNS & NELSON

State Senator Barry Keene  
Chairman, Senate Judiciary Committee  
State Legislature  
State Capitol  
Sacramento, CA 95814

RECEIVED  
OCT 11 1984

Re: Item Pricing Testimony

Dear Senator Keene:

I was discussing with my niece pending legislation regarding abolition of item pricing in supermarkets and stores.

I understand you are holding hearings. If I were called to testify, I would tell you that item pricing is the greatest protection there is for every shopper in this State.

My view of the computerized cash registers, and items of that kind that are going into greater use, indicates to me that the shopper, as an individual, will have their protections against erroneous pricing by the computer cash register and against errors by the market.

If you eliminate item pricing, you will be doing a tremendous disservice to every customer of every market in the State of California, and, in fact, will be doing a disservice to the markets, themselves, since they will be subject to many, many claims and screams concerning the errors that might or might not occur.

I will appreciate your consideration of this letter as a part of the testimony before your Committee.

Very truly yours,

Robert B. Lisker

RBL:lb  
cc: Kathy Klass

1. The first part of the document is a list of the names of the persons who have been appointed to the various positions of the Board of Directors of the company.